



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 15, 2003

Mr. Philip Marzec
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2003-0321

Dear Mr. Marzec:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175046.

The San Antonio Independent School District (the "district"), which you represent, received a request from an attorney representing a district student for:

[1] a complete copy of [the requestor's client's] school records. Please include any documentation that lists the individuals that can remove [the student] from [the school] premises. Additionally, we respectfully request [2] the school's policies regarding the removal of students from school premises during school hours during the time period in question. Moreover, [3] any complaint made against [the school] or any school within the San Antonio Independent School District by any student, teacher, parent, child or person for allowing a student to be removed from the school's premises without the parents['] or legal guardians['] consent. Moreover, we request [4] any reprimands, evaluations, memos, letter's [sic] from principals, superintendents, teachers, counselors, parents or students referring to [a named teacher]. Additionally, we are requesting [5] a complete copy of the investigation pertaining to the allegations being made by [the requestor's client] or her parents/legal guardians regarding this incident.

You state that information responsive to categories 1, 2, and 5 of the request have been provided to the requestor. You also state that the only information that the district maintains that is responsive to category 3 of the request is the request itself. *See Economic*

Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266, 267-68 (Tex. Civ. App.-San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983) (governmental body not required to release information that did not exist when request for information was received or to prepare new information). You state that the only information that the district maintains that would be responsive to category 4 of the request are teacher evaluations, which you claim are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the district has failed to comply with the requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request for information. In addition, section 552.301(e) requires a governmental body to submit within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

In this instance, you state that the request was received on October 15, 2002. You inform us that you came to an agreement with the requestor that the request would be treated as if received on October 21, 2002. However, the deadlines contained in section 552.301 are fixed by statute and cannot be altered by an agreement. See Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under the [predecessor to the Public Information] act cannot be compromised simply by its decision to enter into a contract. See Attorney General Opinion JM-672 (1987); Open Records Decision No. 514 (1988).”); see also *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (governmental agency may not bring information within scope of predecessor to section 552.101 of Government Code by promulgation of rule; to imply such authority merely from general rule-making powers would be to allow agency to circumvent very purpose of predecessor to Public Information Act), *Bristol-Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 673 (Tex. App.-Fort Worth 1997, pet. denied) (“Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy.”) You did not submit a request for a ruling until November 4, 2002 and did not provide the documents required under section 552.301(e) until November 11. Thus, you failed to meet both deadlines prescribed by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov’t Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.-Austin 1990, no writ)

(governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." In Open Records Decision No. 643 (1996), this office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation and that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *See* ORD No. 643. Based on the reasoning set out in Open Records Decision No. 643, we conclude that most of the submitted information constitutes evaluations of a certified teacher that are confidential under section 21.355 of the Education Code and must therefore be withheld pursuant to section 552.101 of the Government Code. We have marked the documents that you must withhold.

However, we conclude that some of the submitted documents do not constitute evaluations for purposes of section 21.355 of the Education Code. We note that one of these documents contains information that is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g. FERPA, which is also encompassed by section 552.101 of the Government Code, provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A).

Information must be withheld from disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable).

through handwriting, style of expression, or particular incidents related). We have marked the information that is protected by FERPA and must be withheld pursuant to section 552.101 of the Government Code.

In summary, the district must withhold the marked evaluations pursuant to 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. In addition, we have marked student-identifying information that is confidential under FERPA and must be withheld. The remaining documents do not constitute evaluations and are not otherwise confidential as to this requestor and must therefore be released.¹

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

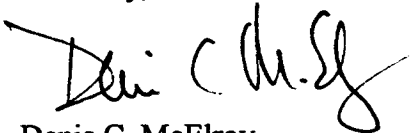
¹We note that these records include information concerning the requestor's client that would ordinarily be withheld to protect that individual's common law privacy. See *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). However, as the representative of the subject of such information, the requestor has a special right of access to it. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Should the district receive a request for this information from an individual other than the requestor or his client, it must seek another ruling from this office.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is fluid and cursive, with the first name "Denis" being more prominent.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 175046

Enc. Submitted documents

c: Mr. Raul Rios
900 S. E. Military Drive
San Antonio, Texas 78214
(w/o enclosures)